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PIERCE COUNTY WASHINGTON
BY KEVIN STOCK County Clerk
Deputy

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Judge D. Gary Steiner
Department 10

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**STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT**

10 DOUGLAS TOBIN,

NO. 07-2-12633-9

11 Plaintiff,
12 v.
13 STATE OF WASHINGTON and
14 PIERCE COUNTY,

DEFENDANTS' REPLY BRIEF

15 Defendants.
16

17 Plaintiff has submitted what he entitles a "motion for summary judgment" and a
18 supporting declaration. Neither document raises an issue of fact sufficient to defeat the motion
19 for summary judgment filed by the State of Washington. The points raised in these pleadings
20 are addressed as follows:

21 1. Plaintiff states that his daughter did not receive the property that he was entitled
22 to receive from officers of the Washington State Department of Fish and Wildlife and states that
23 no receipt was produced. (This statement is not set forth in a sworn declaration as required by
24 CR 56 (e) but is recited in plaintiff's motion and therefore cannot be considered in opposing to a
25 motion for summary judgment). In any case this conclusionary statement is directly contradicted
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1 from the Declaration of Stacey Tobin, plaintiff's daughter, who testified in her declaration that
2 she did in fact receive the personal property that her father was entitled to receive from
3 Washington Department of Fish and Wildlife officers when she met them in January 2004. See
4 Declaration of Stacey Tobin. See also Declarations of Charles R. Pudwill and William Jarmon
5 Jr.

6 2. Plaintiff argues that he did not have effective counsel in the criminal cases
7 pursued against him. Although this may be a basis to collaterally attack his criminal convictions,
8 it is irrelevant in the present case and doesn't raise an issue of fact concerning whether or not
9 officers of the State of Washington returned to plaintiff the property seized at the time of his
10 arrest that he was entitled to have returned pursuant to the Stipulation on Forfeiture of Property
11 dated December 10, 2003.

12 3. Plaintiff argues that no search warrant was issued allowing the seizure of his
13 personal property and that only an "affidavit" was produced by the State in response to discovery
14 in this action. This is not correct. On March 15, 2002 Judge Katherine Stoltz of the Pierce
15 County Superior Court issued a "Search Warrant for Fruits, Instrumentalities and/or Evidence of
16 Crime." See Exhibit A to Declaration of Charles R. Pudwill. This document was produced to
17 plaintiff in response to discovery in this lawsuit. See Supplemental Declaration of Patricia C.
18 Fetterly. The issuance of the search warrant coincided with the filing of the initial information in
19 Pierce County Cause No. 02-1-01236-3 in which plaintiff was charged with numerous crimes
20 related to the illegal harvest and sale of shellfish belonging to the State of Washington. On
21 March 18, 2002 a bench warrant was issued for plaintiff's arrest. Plaintiff was arrested pursuant
22 to this warrant on March 18, 2002, the same date that his personal property related to his alleged
23 criminal activities was seized pursuant to the search warrant dated March 15, 2002. See
24 Declaration of William Jarmon Jr. and Supplemental Declaration of Patricia C. Fetterly
25 Plaintiff's property was in fact seized pursuant to a lawfully issued search warrant at the time of
26

1 his arrest on March 18, 2002. See Declaration of William Jarmon Jr. Plaintiff was later charged
2 in December of 2002 with additional crimes related to the illegal harvest and sale of shellfish in
3 information filed in Pierce County Cause No. 02-1-05810-0. See Declaration of Tom L. Moore.
4 This resulted in additional criminal charges that arose out of the same criminal investigation. It is
5 immaterial that the search warrant was not filed in either cause number since it was lawfully
6 issued by a judge of the Pierce County Superior Court.

7 4. In his guilty pleas filed in 2003 plaintiff agreed to forfeit all property received at
8 the time of his arrest to the State of Washington . See Declaration of Tom L. Moore. On
9 December 10, 2003 plaintiff and the State of Washington entered into a Stipulation filed in
10 Pierce County Cause No. 02-1-05810-0 in which the State of Washington agreed to return a
11 limited amount of personal property to plaintiff's designated representative. The items to be
12 returned were listed in the Stipulation which referenced both Cause No. 02-1-05810-0 and Pierce
13 County Cause No. 02-1-01236-3. The Stipulation expressly stated that "[t]he rest of the
14 property seized by the State will become the property of the State of Washington, Department of
15 Fish and Wildlife, Statewide Enforcement Program." See Exhibit H to Declaration of Tom L.
16 Moore. It is undisputed that all property covered by the Stipulation has been returned to
17 plaintiff's representatives. It is immaterial that the Stipulation allowing the return of this
18 property was not filed in both criminal actions. It referenced both cause numbers which
19 concerned criminal prosecutions arising out the same criminal investigation. See Declaration of
20 William Jarmon. The fact that the Stipulation was not filed in both criminal actions does not
21 raise a material issue of fact sufficient to defeat summary judgment in this action.

22 5. Plaintiff argues that the Stipulation dated December 10, 2003 is null and void
23 because it was not based upon a search warrant issued in both actions. This argument lack merit.
24 The Stipulation clearly refers to both cause numbers. If in fact the Stipulation is void, then all
25

1 property remains forfeited to the State of Washington pursuant to the express terms of the please
 2 bargain agreements plaintiff entered into earlier in 2003. See Declaration of Tom L. Moore.
 3

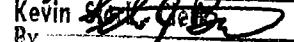
4 The materials filed by plaintiff fail to raise a genuine issue of material fact sufficient to
 5 death defendant's motion for summary judgment. Plaintiff's declaration contains much
 6 speculation, inadmissible hearsay and allegations wholly irrelevant to issues raised in the State's
 7 motion for summary judgment. See Defendant's Motion to Strike Declaration of Douglas Tobin.
 8 It is well established that in order to defeat a motion for summary judgment the non-moving
 9 party cannot rely on allegations and speculation but must come forward with admissible evidence
 10 in the form of sworn testimony demonstrating that a genuine issue of material fact exists. Such
 11 declarations must be based upon personal knowledge, be admissible at trial and not merely rely
 12 on conclusory allegations, speculative statements or argumentative assertions. *Grimwood v.*
University of Puget Sound, 110 Wn.2d 355, 753 P.2d 517 (1988). In the present case the
 13 material facts are undisputed. All property seized at the time of plaintiff's arrest in March of
 14 2002 that he was entitled to have returned to him as been returned. The motion for summary
 15 judgment of the State of Washington should be granted. Plaintiff's complaint should be
 16 dismissed.

17
 18 DATED this 18 day of January 2008.
 19

ROBERT M. MCKENNA
 Attorney General

21 
 22 PATRICIA FETTERLY, WSBANo. 8425
 23 Assistant Attorney General

24 STATE OF WASHINGTON, County of Pierce
 25 ss; I, Kevin Stock, Clerk of the above
 26 entitled Court, do hereby certify that this
 foregoing instrument is a true and correct
 copy of the original now on file in my office.
 IN WITNESS WHEREOF, I hereunto set my
 hand and the Seal of said Court this
 day of Feb 12 2009, 20

By  Deputy

ATTORNEY GENERAL OF WASHINGTON
 Torts Division
 7141 Cleanwater Drive SW
 PO Box 40126
 Olympia, WA 98504-0126
 (360) 586-6300

PROOF OF SERVICE

I certify that I caused to be served a copy of this document on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid via Consolidated Mail Service
 - ABC/Legal Messenger
 - State Campus Delivery
 - Hand delivered by _____

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct,

DATED this 22 day of January, 2008, at Tumwater, WA.

Laurel B. DeForest
LAUREL B. DEFOREST